

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

**Creation of a Low Power
Radio Service**

MM Docket No.: 99-25

RM-9208

RM-9242

TO: The Commission

**JOINT COMMENTS OF GALAXY COMMUNICATIONS, L.P. AND DESERT WEST
AIR RANCHERS CORPORATION**

Galaxy Communications, L.P. and Desert West Air Ranchers Corporation (together, the “*Joint Commenters*”), hereby submit their joint comments in response to the Commission’s *Second Order on Reconsideration and Further Notice of Proposed Rulemaking* in MM Docket No. 99-25, FCC 05-75 (released March 17, 2005) (“*FNRPM*”), in the above-captioned proceeding.

I. Introduction

The Joint Commenters (and their respective related entities) own and operate numerous AM and FM broadcast stations and FM translators. While acknowledging the role of the low power FM (“*LPFM*”) service in increasing spectrum diversity and providing community-oriented programming, these joint comments address the technical issues raised in the *FNRPM* and demonstrate that the current rules adequately allow LPFM licensees to meet the goals set forth by the Commission in creating the service. Additionally, these comments emphasize that continued protection of existing full-power broadcast stations and fill-in FM translators is paramount under Section 307(b) of the Communications Act. Thus, any change in current

interference protection requirements and in the processing of pending applications must not impair the operation of these services. For the reasons stated above, the Joint Commenters urge the Commission not to adopt the additional rules proposed in the *FNPRM* and request that the current freeze on the granting of new FM translator applications be lifted no later than September 17, 2005, as specified in the *FNPRM*.

II. Discussion

A. Altering the co-equal status of LPFM and translator stations and dismissing pending FM translator applications would significantly compromise the integrity of full-power stations

In the *FNPRM*, the Commission sought comment on “whether, and, if so, under what conditions the LPFM applications should be treated as having primary status to prior-filed FM translator applications and *authorized FM translator stations*.”¹ (emphasis added) It also questioned whether it should “dismiss all pending applications for new FM translator stations and make potential refilings subject to the resolution of the licensing issues...[and] dismiss pending mutually exclusive FM translator applications.”² The Joint Commenters believe that the effect of taking any of these steps would be to significantly erode full-power broadcast service, at a great cost to broadcasters and the public, while offering little benefit to LPFM applicants and licensees.

In its Report and Order establishing the LPFM service, the Commission adopted minimum distance separation requirements for LPFM stations, concluding that such rules would “provide the most efficient means to process a large number of applications while insuring the overall integrity of the FM service.”³ Subsequently, it clarified that these interference

¹ *FNPRM* at ¶33.

² *Id.*

³ *FNPRM* at ¶29.

protections placed LPFM and translator stations on “essentially equal footing in providing reciprocal interference protection.”⁴ The Commission emphasized that the maintenance of translator-based delivery of broadcast programming was an “important objective” necessitating the imposition of procedures to resolve allegations on interference caused by an LPFM station, particularly where FM translators receive their primary station’s signal via a chain of translator input signals.⁵

The Commission’s creation and augmentation of reciprocal interference obligations for LPFM and translator services demonstrates that it generally favors a balanced approach in defining parameters for the coexistence of both services.⁶ The LPFM advocates’ request that the rules governing the application process, and as a result, the consideration of predicted interference, be altered to give LPFM applications priority over FM translator applications, would disrupt this balance. In advancing their position, the advocates claim that translator applications are being filed by non-local organizations, acquiring large numbers of licenses for purposes other than merely supplementing the reach of the primary FM service. While this may be true, such activity is technically permissible under the FCC rules and regulations. The vast majority of FM translator licensees do not fit into the “application mill” characterization and do not encroach, either functionally or technically, on the LPFM service.

Full-power licensees are expected to deliver an interference-free signal to both a

⁴ *Creation of a Low Power Service*, 15 FCC Rcd 19208, 19223 (2000) (“*Reconsideration Order*”).

⁵ *See id.*

⁶ The Joint Commenters note that, in establishing the LPFM service, the Commission did stray somewhat from historical practice by allowing the new LPFM service to encroach on the 60 dBu signal – usually referred to as the station’s interference-free contour. Interference is interference regardless of the name of the service which happens to be causing the interference, and the potentially harmful effects to full-service stations from LPFM stations are a matter of considerable concern.

particular area and to the audience within that area. In many instances, the full-power station's signal falls short of its predicted signal in certain areas, as a result of topographical obstacles or other technical difficulties. It is precisely such instances that necessitate use of fill-in translators to rebroadcast a primary station to unserved locations within the primary station's service contour. Listeners in these areas would not receive the broadcast of the primary station but for the existence of these translators.⁷ A fill-in translator is, then, akin to a prosthetic limb, grafted on to restore an individual's original, unimpeded functionality, and, in that sense, should not be viewed as a separate station, standing apart from the full-power station, but as an integral part of the full-power station. Moreover, a fill-in translator cannot, by the terms of its license, comprise part of a network of transmitters fed by satellite signal. Because it rebroadcasts the signal of its primary station and is required to maintain its service contours within the service contour of the primary station, the fill-in translator is quintessentially a *local* service which guarantees the local audience access to local programming that the Commission has already determined, in granting the full-power authorization, the audience should receive.

To alter the status of the LPFM service vis-à-vis authorized fill-in translators carrying out this crucial function would reduce the population served by the primary stations, in contravention of the explicit mandate to "provide a fair, efficient, and equitable distribution of radio service" to all states and communities, as set forth in §307(b) of the Communications Act, and of the Commission's goal of "maintaining the integrity of existing FM radio service."⁸ Relegating translators to secondary status in relation to LPFM stations, not only for the resolution of interference claims, but in the overall licensing process, will result in reduced output, terminated

⁷ The use of FM boosters is not an acceptable alternative, as they tend to cause interference with the primary station in all but the most difficult terrain.

⁸ *FNPRM* at ¶1.

operations, and the dismissal of large numbers of applications for fill-in translators. The effect of this transformation of the licensing scheme cannot be overstated. It would sever a critical component (the prosthetic limb, as described above) of the full-power station broadcast outlet, thus creating “holes” within the primary service areas of these stations, denying rightfully expected service to listeners within in the these contours, and crippling the ability of full-power stations to reach their markets in fulfillment of their compact with the FCC to serve the public interest.

Further, there is no evidence that giving LPFM applicants a technical edge over mutually exclusive FM translators in the application process will lead to the proliferation of LPFM stations actually being licensed to operate. LPFM applicants are subject to stringent ownership requirements that naturally reduce the overall number of potential participants in the service, a position tacitly accepted and advanced by the Commission throughout this proceeding.⁹ Moreover, the Commission itself noted that the LPFM application process, under the existing requirements and constraints, has led to the grant of over 1,000 permits, with more than half of these permits on the air as of March 17, 2005.¹⁰ As of the time of this filing, only approximately 230 applications for new LPFM stations are pending. Based on such indications of success, the LPFM advocates’ position that FM translators’ co-equal status burdens the growth of the LPFM service is simply inaccurate. Any concerns regarding loss of spectrum are speculative at best,

⁹ Indeed, the Commission has continually reaffirmed the limited nature of the LPFM service as a noncommercial, educational service, to be barred from cross-ownership with any other broadcast service. *See Creation of a Low Power Service*, 15 FCC Rcd 2205, 2213-2217 (2000); *see also Reconsideration Order* at 19237-19238 (emphasizing that the ownership and eligibility restrictions would lead to improved access to the airwaves by a greater segment of the population). The *FNPRM* does not raise for consideration any modification to these restrictions.

¹⁰ *See FNPRM* at ¶7.

and even then, not supported by current data.¹¹

Were the Commission to enact any of these proposed changes, it is essential that all existing translators receive grandfathered protection in order to protect the substantial financial investment made by applicants. Grandfathering is a historically approved and necessary means of assuring regulated entities that their justified reliance on the statutory and rulemaking authority in place at the time of licensing is safeguarded. It is particularly important to note that existing translator licensees, and translator applicants, undertook the effort and expense to establish their current positions pursuant to established rules and policies of the Commission. That is, those licensees and applicants were not simply acting on their own, hoping that eventually the Commission might formally recognize and endorse their efforts. To the contrary, they were acting at the Commission's specific invitation, pursuant to elaborate rules and policies articulated by the Commission. For the Commission to tell those licensees and applicants that, "whoops," the Commission has now changed its mind and, as a result, their effort and expense have been for naught would send a deleterious signal not only to this limited universe of regulatees, but to *all* regulatees.¹²

¹¹ If the Commission were inclined to adopt some overall prioritization or hierarchy of FM services, the Joint Commenters suggest the following. First and foremost, full-service FM stations must be assured the most protection, as they are the primary service providers in the FM band. Next come fill-in translators which assure that full-service stations are able to deliver their signals as contemplated by their instruments of authorization. As discussed above, such fill-in translators are more correctly seen as integral elements of the main station, rather than stand-alone, separate stations. Third, LPFM stations and locally-oriented translator stations should be approximate equals. In this context, "locally-oriented translators" would include those licensed to local groups desiring to import geographically nearby stations whose reception is otherwise blocked by topography. And fourth in priority should be FM translators which retransmit signals from sources geographically distant from the translator. Such translators provide nothing which might be viewed as "locally-oriented" programming, and thus should not be permitted to impede stations which would provide such programming.

¹² The Joint Commenters recognize that the number of pending FM translator applications is substantial. But with all due respect, that is a problem of the Commission's own making. By

B. A continued freeze on the granting of pending translator applications would cause undue harm to full-power stations' operations

The broad scope of this proceeding notwithstanding, it is of vital importance that the freeze on granting of pending applications be lifted on the scheduled date of September 17, 2005. Generally, a freeze is an emergency measure taken in a situation involving unusual circumstances and the issuing agency is obligated to return to normal operation in a reasonable amount of time.¹³ This current freeze has been a useful measure in preserving the *status quo*, and thus, preventing any translators with purely non-local operations from becoming established while the Commission conducted its inquiry. However, it has also wreaked havoc on legitimate full-power broadcasters who are seeking translators to provide essential fill-in service, and it is costly to the public who is deprived of the assured delivery of the signal of the primary stations associated with the proposed translators. The Joint Commenters urge the Commission to lift the freeze so that *bona fide* fill-in translators may be authorized and constructed as soon as possible. It would be contrary to the public interest to allow applications for such translators to stagnate while local audiences continue to suffer the non-availability of the local service to which they are

opening a filing window and inviting a limitless number of applications (in 2003), the Commission created the current situation, a situation which could easily have been predicted from the fact that the Commission had, prior to the opening the 2003 translator filing window, prohibited any such filings for years. The Commission cannot have been oblivious to the likely pent-up demand that prohibition had created. In any event, the Joint Commenters urge the Commission not to react to this situation in a way which merely exacerbates the problem without resolving it.

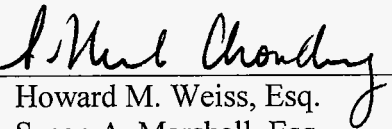
¹³ See e.g., *In re Allegheny Communications Group, Inc.*, 1997 U.S. App. LEXIS 5994 *2 (D.C. Cir. Feb 7, 1997) (though writs of mandamus denied, court preserved petitioners' right to renew petition if FCC did not make "significant process toward lifting the freeze on comparative qualification proceedings" within six months) and *Harvey Radio Laboratories, Inc. v. United States*, 289 F. 2d. 458, 461 (D.C. Cir. 1961) (though petitioner was unsuccessful in obtaining a judicial order directing the FCC to take action on its application during a freeze, the court cautioned that its affirmation did not "alter the obligation of the Commission to dispose of these matters as promptly as possible").

entitled.

The Joint Commenters respectfully request the Commission's consideration of the foregoing matters.

Respectfully submitted,

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Dated: August 22, 2005

CERTIFICATE OF SERVICE

I, Sima N. Chowdhury, an associate attorney at Fletcher, Heald & Hildreth PLC and member of the Bar of the District of Columbia, hereby certify that I caused true and correct copies of the foregoing Joint Comments to be transmitted to the following parties on this 22nd day of August, 2005, via e-mail, or as otherwise specified:

Chairman Kevin J. Martin

Commissioner Kathleen Q. Abernathy

Commissioner Michael J. Copps

Commissioner Jonathan S. Adelstein

cc: Peter Doyle, Mass Media Bureau
James Bradshaw, Mass Media Bureau
Edward Levine, Galaxy Communications, LP*
Ted Tucker, Desert West Air Ranchers Corp.

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By: S. N. Chowdhury

Date: August 22, 2005